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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, and E. E. FUQUA, *Petitioners,*

vs.

CENTRAL AIRLINES, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S REPLY BRIEF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners have filed a "Brief for Petitioners" which elaborates on and changes somewhat the arguments and contentions presented in the petition for certiorari but does not withdraw them. Therefore, this brief is directed at both the petition for certiorari and the Brief for Petitioners as well as the contentions made by the dissent in the Fifth Circuit opinion.

JURISDICTION

This case involves solely the question of the jurisdiction of the United States District Court for the Northern District of Texas. Hence, our attack is on

the jurisdiction of the District Court and not of the United States Supreme Court.

QUESTION PRESENTED

By Petitioners:

"Whether a suit to enforce an award of an airline system board of adjustment, created by requirement of the Railway Labor Act, presents a federal question that confers jurisdiction on a United States District Court."

By Respondent:

Whether a suit by an individual airline employee to enforce an award by an airline system board of adjustment is one which arises under the Constitution, laws and treaties of the United States.

STATEMENT OF THE CASE

This is a suit by six individual employees of Central Airlines, Inc., a certificated air carrier, each of whom filed a grievance claiming wrongful discharge and each of whom processed that grievance (with the union as its representative) through the grievance procedure provided in the contract between the employer and the union through the system board of adjustment, and each of whom received an award in his favor ordering reinstatement with lost wages. The International Association of Machinists is the bargaining representative of these employees, but it has no interest in this lawsuit; it is a "courtesy party" who is in this suit so that it may give each of the individual plaintiffs the benefit of its legal staff and its

experience. No grievance was filed by the union in its own behalf, and no award was rendered for the union's benefit. The defendants filed a motion to dismiss the union as neither a necessary nor a proper party, which was not acted on by the Court because the entire suit was dismissed.

Therefore, this suit stands in this Court in exactly the same fashion as though an individual employee of Central Airlines had filed a grievance which had been duly processed and had received an award from the system board of adjustment in his favor for reinstatement and back pay, less, of course, wages earned by him from other employers during the interim. The sole question before this Court is whether the United States District Court for the Northern District of Texas has jurisdiction to try a suit by such individual plaintiff to enforce his award which he received by virtue of the contract between the union and the airline. The union is no more a party in interest in this case than is the attorney who represents Central Airlines. It is Cornstubble's advocate, not a party in interest.

While no contention is made or, we take it, will be made that the defendant's answer can be looked to grant jurisdiction not given on the face of the complaint, we have no reason to deny that it is Central's position that the award is unenforceable for several reasons. The simplest one to state is that these employees, and each of them, were ordered to work overtime, and each of them refused to work overtime and refused to give any reason for their rejection of orders to work overtime. They were discharged for

refusal to work overtime and for refusal to give reasons for not working overtime. The award in this case specifically refused to pass on the right of the defendant to discharge Cornstubble and the other five for refusal to work overtime (R. 33). One of the reasons why the award is unenforceable grows out of that situation, since it is Central's position that when an employer discharges an employee for two or three reasons, a binding award would dispose of each of the reasons. To put it simply, A Company fires John Doe for murdering his foreman, burning down the plant, and for wearing a red tie to work. That discharge is submitted to an arbitrator, and he finds that wearing a red tie to work is not just grounds for discharge, and therefore says he need not pass upon the question of the murder of the foreman or the burning down of the plant, since there was one unsound reason for discharging John Doe. The award is attacked on other grounds, but none of the attacks is made on the basis of the validity of the contract under the Railway Labor Act nor on the basis that the System Board of Adjustment was not properly created under the terms of the Railway Labor Act, nor in any other way does the answer put in issue the validity or construction of the Railway Labor Act.

In the Trial Court the complaint predicated jurisdiction solely under 28 U.S.C.A. Sec. 1331, alleging that all of the six grievants' financial interests exceeded $10,000 in total and that the federal act involved was the Railway Labor Act. There is in this case no request for the right to amend, and of course no amendment to such complaint has been made. In

the Circuit Court, as its opinion shows, on oral argument the question was raised whether jurisdiction could be predicated on 28 U S.C.A. Sec. 1337 and on Section 301 of the Taft-Hartley Act. In the Circuit Court petitioners conceded that there was no jurisdiction under the Taft-Hartley Act, but their position in the Supreme Court of the United States seems to be that they now want to rely not only on 28 U.S.C.A. Sec. 1331, but also on 28 U.S.C.A. Sec. 1337, 45 U.S.C.A. Secs. 151-163, 45 U.S.C.A. Secs. 181-188, and the Labor Relations Act, 29 U.S.C.A. Secs. 141-144 and 29 U.S.C.A. Secs. 171-188. (See petition for writ of certiorari, page 2.) Not knowing to what extent the United States Supreme Court is going to limit its review of this case to the one presented to the Trial Court, and preferring to brief matters which should not be involved rather than to risk leaving contentions unanswered, respondent will deal with jurisdiction as argued by the petitioners. In doing so, however, respondent certainly does not waive its right to have the District Court's jurisdiction determined from the complaint presented to the District Court.

Since, as is obvious from the foregoing, the point presented is a narrow one, and whether it is phrased as we have above or whether it is phrased as the "question presented" in the petition for certiorari, the parties are reasonably close together in their u..derstanding of what was decided by the Trial Court and the Circuit Court. Therefore, we think it may be helpful to this Court to divide this brief into four sections, as follows:

FIRST SECTION

The complaint on its face claimed jurisdiction under 28 U.S.C.A. Sec. 1331 and failed to show that each of the individual plaintiffs had an amount in controversy in excess of $10,000; therefore, the judgment of the Trial Court was correct.

SECOND SECTION

Neither the Labor-Management Relations Act nor the Railway Adjustment Board Portion (28 U.S.C.A. Sec. 153) of the Railway Labor Act are applicable to a suit by an airline employee to enforce an award by a system board of adjustment.

THIRD SECTION

The Federal Law which gives jurisdiction under 28 U.S.C.A. Secs. 1331 and 1337 is Statutory Law and not Federal Common Law.

FOURTH SECTION

A suit by an airline employee to enforce an award in his favor granted by virtue of a contract between a union and the airline does not present a Federal question under either 28 U.S.C.A. Sec. 1331 or 28 U.S.C.A. Sec. 1337.

Respondent's brief on the merits will be presented under the foregoing divisions.

ARGUMENT ON THE MERITS

FIRST SECTION

The complaint on its face claimed jurisdiction under 28 U.S.C.A. Sec. 1331 and failed to show that each of the individual plaintiffs had an amount in controversy in excess of $10,000; therefore, the judgment of the Trial Court was correct.

Independent of the ground for dismissal discussed in the opinion of the Circuit Court, the Trial Court's judgment of dismissal must be sustained because the plaintiffs' complaint failed to comply with the requirement under 28 U.S. Code, Sec. 1331(a), that the amount in controversy as to each plaintiff exceed $10,000.

This was a suit to enforce six separate claims by the plaintiffs, Doud, Cornstubble, Broom, Casey, Davis and Fuqua, each of whom claimed wrongful discharge and each of whom filed a separate grievance (R-19). The award was made jointly because of the fact that the ground for discharge was common to the six, but each of such plaintiffs has a separate cause of action for his own re-instatement, and more particularly, each of them, insofar as the award allowed a recovery for lost wages, will have a separate claim in view of the fact that his actual earnings during the time he is off will reduce the recovery against the defendant. In short, the six plaintiffs' cause of action grew out of the same set of facts, but each has a separate cause of action and there is no joint cause of action. The allegations contained in the complaint for federal juris-

diction were (R-4):

> "As a result of defendants' failure, each individual plaintiff has suffered and will stand to suffer substantial damages, including loss of wages from the date of their wrongful discharge, all of which is shown in greater detail in the award attached hereto, as Exhibit B.
>
> "This Honorable Court has jurisdiction of this action under 28 U.S. Code § 131, this being a matter in controversy exceeding the sum and or value of $10,000, exclusive of interest and costs, and arises under the laws of the United States, specifically under the Railway Labor Act as set out more particularly hereinabove."

It is obvious that there is nothing in such complaint showing that each of the plaintiffs had a cause of action involving more than $10,000. The defendant makes no claim that this was raised in the Trial Court or that the Trial Court dismissed on this ground. However, unless the case of *Clark vs. Paul Gray*, 306 U.S. 583, 83 L.Ed. 1001, 59 S.Ct. 744, has been overruled or qualified, the raising of this point in the Trial Court was unnecessary. Additional cases might be added, but *Clark vs. Paul Gray* is also conclusive on the proposition here presented that allegations as quoted above by a number of plaintiffs is insufficient to confer jurisdiction under Section 1331, unless allegations are to the effect that each of such parties has involved an amount in excess of $10,000. As we say, additional cases might be added, but that case is directly in point, has not been qualified or overruled, and we deem it unnecessary to add thereto. Finally, of

course, as the record shows in this case, petitioners did not amend their complaint, either before or after the order of dismissal was entered, and have made no request therefor. In fairness to the Court we should also say that had a request to amend been made to add allegations that each individual plaintiff had a claim in excess of $10,000, we would have contested the good faith of such allegations based upon the testimony of each of the plaintiffs contained in oral depositions taken by the respondent.

Respondent respectfully submits that the judgment of the Trial Court denying jurisdiction was correct on this independent ground.

SECOND SECTION

Neither the Labor-Management Relations Act nor the Railway Adjustment Board Portion (28 U.S.C.A. Sec. 153) of the Railway Labor Act are applicable to a suit by an airline employee to enforce an award by a system board of adjustment.

As pointed out above, petitioners in the Trial Court claimed jurisdiction under 28 U.S.C.A. Sec. 1331(a) based solely upon the section of the Railway Labor Act authorizing the creation of system boards of adjustment by airlines and unions (28 U.S.C. Sec. 184).

However, during oral argument Judge Brown asked that jurisdiction under 28 U.S.C.A. Sec. 1337 be briefed as it applied to Sec. 301 of the National Labor Relations Act. Also, considerable argument has been made in the dissenting opinion and in petitioners' two briefs based on the railroad portion of the Railway

Labor Act (45 U.S.C.A. Secs. 151-163). (See petition for certiorari, page 2, and brief of petitioners, page 3, for example.) In fact, a large portion of the petition for certiorari, the Brief for Petitioners, and the amicus curiae filed herein argues that the question of jurisdiction in the United States District Court for an airline employee suing on an award is the same as that of an employee suing on an award under a contract to which the National Labor Relations Act is applicable or that of a railway employee suing on an award of the National Railway Adjustment Board. As a matter of fact, only 32 per cent of the Brief for Petitioners is devoted to what is really involved here, to-wit, a suit by an airline employee on an award by the system board of adjustment. It is true that on page 13 of the brief for petitioners the issue is met squarely and it is admitted that the "crucial inquiry" is whether or not there is jurisdiction under 28 U.S.C.A. Sec. 1331(a) because the case "arises" under 45 U.S.C.A. Sec. 184. However, that admission results in only the lesser portion of the brief being devoted to that issue, and rather than run the risk that we have failed to answer some of the contentions made, we want to deal briefly with Sec. 301 of the National Labor Relations Act and the railroad portion of the Railway Labor Act.

Petitioners did not claim jurisdiction under Section 301 of the Taft-Hartley Act in the Trial Court. The complaint filed is based solely on 45 U.S.C.A., Section 184. As a matter of fact, the petitioners have always conceded that even had they claimed, in the complaint, jurisdiction under Section 301 (29 U.S.C.A. 185),

said section could not be used to give the United States District Court jurisdiction of the cause. We cannot state the proposition better than petitioners did in their supplemental brief filed in the Circuit Court. We quote from the I.A.M. "Supplemental Brief for Appellants," page 12:

> "The inapplicability of Section 301 of the Taft-Hartley Act as illustrated by the following language in the statute wherein the definitions of employer and employee clearly exclude those covered by the Railway Labor Act:
>
> "Section 301 — jurisdiction is limited to 'Suits for violation of contracts between an *employer* and a labor *organization* representing employees in an industry effecting commerce *as defined in this Act* . . . .'
>
> * * *
>
> "Sec. 2(1) 'The term "*employer*" . . . shall not include . . . any person subject to the Railway Labor Act, as amended from time to time . . . .'
>
> * * *
>
> "Sec. 2(3) 'The term "employee" . . . shall not include . . . any individual employed by an employer subject to the Railway Labor Act, as amended from time to time . . . .'
>
> * * *
>
> "Sec. 2(5) 'The term "labor organization" means any organization of any kind, or any agency or *employee* representation committee or plan, in which *employees* participate and which exists for the purpose, in whole or in part, of dealing with *employers* concerning grievances, labor disputes, rates of pay, hours of employment, or conditions of work.' (Emphasis added)"

Petitioners' concession, as quoted above, is well advised, not only in the light of the language of the Act, but in the light of the language of this Court in *Local Union No. 25 vs. New York, N. H. & H. R. Co.*, 350 U.S. 155, 100 L.Ed. 166, 76 S.Ct. 227, wherein the Court said (350 U.S. 158):

> "The Act, in its definition of an 'employer,' expressly excludes anyone subject to the Railway Labor Act. 61 Stat 137, 29 USC § 152(2). It is of course true that employer-employee relationships of railroads such as respondent are governed by the Railway Labor Act, which was passed before either the National Labor Relations Act or the Labor Management Relations Act. Neither of the latter Acts was intended to tread upon the ground covered by the Railway Labor Act. It is clear that neither railroads nor their employees may carry their grievances with one another to the N.L.R.B. for resolution."

Therefore, had there been a claim asserted in the complaint filed in the District Court of jurisdiction based on Section 301, it could not be relied on. We will not leave this, however, without pointing out, as we shall again subsequently, that Congress clearly intended that airlines and their employees should be treated differently than those covered by Section 301. In other words, by excluding airlines and railroads from Section 301, Congress recognized that the carriers and their employees were "a different breed of cat" and that their labor agreements would be enforced differently.

In what has been said above with reference to Sec-

tion 301 of the Taft-Hartley Act, we have not overlooked the holding of this Court in *Association of Westinghouse Salaried Employees vs. Westinghouse Electric Corp.*, 348 U.S. 437, 99 L.Ed. 510, 75 S.Ct. 489, that Congress did not intend by enacting Section 301 "to open the doors of federal courts to a potential flood of grievances based upon an employer's failure to comply with the terms of a collective agreement relating to compensation and terms peculiar in the individual benefit which is their subject matter and which when violated give a cause of action to the individual employee." No analysis of the three majority opinions in the *Westinghouse* case by counsel could equal that of Judge Hastie in *United Steel Workers vs. Pullman-Standard Car Manufacturing Co.* (3rd Cir. cert. denied), 241 F. 2d 547. The cause of action asserted by Doud, Cornstubble, et al, the individual plaintiffs here, is certainly as individual to them as those dealt with in the *Westinghouse* and the *Pullman* cases.

We emphasize again here, as we said in the beginning, that the Machinists' Union is a "courtesy party" here and not a party in interest. The union had no award in its favor, and this is a suit by six individual employees, each to recover on his own grievance, which culminated in an award in his favor.

In addition to Section 301 of the Taft-Hartley Act, Judge Brown and petitioners give great weight to those provisions of the Railway Labor Act, which are expressly not applicable to airlines. (44 Stat. L. 577, as amended; 45 U.S.C.A. Sec. 151-163.) 45 U.S.C.A., Sec. 153, First, sec. (p) provides:

> "If the carrier does not comply with an order of a division of the Adjustment Board . . . the petitioner . . . may file in the District Court of the United States for the district in which he resides . . . . Such suit in the District Court of the United States shall proceed in all respects as other civil suits except that on the trial of such suit the findings and orders of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . ."

The enforcement of awards by railroad employees, then, is expressly given to the United States District Court. The trouble is, of course, that Section 153, is not applicable to airlines (45 U.S.C.A. Secs. 181 and 184) until (Sec. 185) the National Mediation Board establishes "a permanent National Board of Adjustment." And, of course, no such National Board of Adjustment for airlines has been established.

The provision of the act making Section 153 not applicable to airlines is so clear that it needs neither argument nor authority. However, the exclusion is discussed in *National Airlines vs. Metcalf* (5th Cir. cert. denied) 271 F. 2d 817.

We therefore have a clear showing that Congress did not intend for an award by Central Airlines' System Board of Adjustment in favor of an employee named Cornstubble to be enforced in the federal courts under Section 301 of the Taft-Hartley Act. We also have a clear showing that Congress did not intend that that same award in favor of Cornstubble should be enforced by him in the federal courts under Section 153(p) of the Railway Labor Act. What petitioners

and Judge Brown in his dissenting opinion do is to say that, because Congress provided that Cornstubble's award is not enforceable in the federal court under Section 301, and because Congress provided that it is not enforceable in the federal courts under Section 153(p) of the Railway Labor Act, therefore Congress clearly intended that such award should be enforceable in the federal courts. This is strictly zero plus zero equals one. Two no's do not make a yes. The fact that Congress has clearly said that an airline employee's award from his System Board of Adjustment is not enforceable in the federal courts, under Section 301 or under the Railway Labor Act, means that Congress planned and expected that the award by a System Board of Adjustment to an airline employee would be handled differently and be enforced differently from the other two situations.

Petitioners, using Judge Brown's approach, make much of what they call a "paradox" in that airline awards are enforced in the state courts but railroad employee awards are enforced in the federal courts. There are many paradoxes in the Railway Labor Act. For example, a railroad employee who loses before the Railway Adjustment Board is through, and may not attack that award in the state or federal courts; but, by the very statutory scheme spoken of by the petitioners, the railroad against whom the award is made may attack same in the United States District Court. Such "paradox" did not prevent the enforcement of the statute as written in *Union Pacific Ry. Co. vs. Price*, 360 U.S. 601, 3 L.Ed. 2d 1460, 79 S.Ct. 1351.

Consistency has never been the hallmark of state and federal jurisdiction. It is certainly equally paradoxical that under 28 U.S.C.A. 1331 a citizen whose rights under a federal statute are worth $9,000 must litigate in the state court to enforce the rights given him by a federal statute, but that a citizen whose similar federal statutory rights have been violated to the extent of $11,000 may sue in the United States District Court. The paradox is inherent in our dual system of courts, and the answer, of course, to any argument of "paradox" is that the United States District Court is a court of limited jurisdiction and has only that jurisdiction given to it by Congress.

In solving this problem, we cannot for the life of us see what difference it makes why Congress treated airline employees and their awards differently, as far as jurisdiction is concerned, from railroad employees or employees of any other industry. What is important is that they were treated differently. As this Court very recently said, in *Sinclair Refining Co. vs. Atkinson*, 8 L.Ed. 2d 440:

> "In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible —and here it seems crystal clear—we must give effect to that intent."

If the congressional intent to treat airline employees and their awards from a System Board of Adjustment differently is clear, then whether such different treatment results from good reasons, bad reasons, or

no reasons would seem to be utterly unimportant. We can think of what seems to us to be an excellent reason for treating them differently. As the Airline Act (45 U.S.C.A. Secs. 181-188, and particularly Sections 184 and 185) clearly shows, Congress intended, to start with at least, that grievances should be handled differently on airlines than on railroads. It provided for only a System Board of Adjustment and clearly intended that the Mediation Board should see how that worked, and if it worked, then no National Airline Adjustment Board would be necessary. The obvious reason for such experimental period is that the Railway Adjustment Board is not such an unqualified success that Congress wanted to adopt that method for airline grievance settlement. So much is obvious from the express terms of the Act. And, if that is obvious from the Act, it certainly is a reasonable conclusion that Congress also was willing to experiment with state court enforcement on the similar theory that enforcement of railroad employee awards in the federal court had not been so successful as to demonstrate that that was the only tribunal to deal properly with them. The whole scheme for the handling of airline employee grievances is deliberately different. It is deliberately intended to be different. And, from such obvious intention of Congress for different handling, it is impossible to infer an intent for handling of airline awards in the same manner as those of railroad employees.

But, let us suppose that Congress had no reason. Let us suppose that Congress's failure to specify that the airline adjustment board awards were enforce-

able in the federal courts was a rank case of oversight. Can it be argued that "oversight" on the part of Congress creates federal jurisdiction? Are United States District Courts courts of general jurisdiction to which all causes of action may be brought unless there is an act of Congress specifically excluding their jurisdiction? The answer is that if there is anything well settled, it is well settled that the United States District Court is a court of limited jurisdiction having only jurisdiction when it is specifically given by statute. See, for example, *Kline vs. Burke Const. Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226.

Petitioners attribute to Congress great fear of the state courts as the enforcers of federal statutes. No attempt is made to support the contention that Congress would be horrified if its statutes were construed and applied by state courts. Particularly here, no attempt is made to show a congressional fear of state courts as the vehicle for the protection of the rights of airline employees and airlines. Any contention that Congress (and this Court) must consider that state courts are incompetent to enforce and apply federal labor statutes is completely destroyed by the undoubted fact that even if the state court does not have exclusive jurisdiction it certainly has concurrent jurisdiction in this exact situation. See *Teamsters Union vs. Lucas Flour Co.*, 369 U.S. 95, 7 L.Ed. 2d 593; *Doud Box Co. vs. Courtney*, 368 U.S. 502, 7 L.Ed. 2d 483.

If the state court had jurisdiction of a suit by the employee to enforce the award or a suit by the airline to enjoin its enforcement, it is because Congress so intended. If the state courts are good enough to

have concurrent jurisdiction, obviously they are good enough to have enclusive jurisdiction. Lastly, if a state court were to misconstrue the rights of an employee (or an airline) on some matter which involved the federal statutes, then of course the United States Supreme Court has jurisdiction on certiorari from the state's highest court.

All of the foregoing may be unnecessary, for we believe that this Court will confine its decision to the issue of jurisdiction presented to the Trial Court, that is, whether under 28 U.S.C.A. Sec. 1331(a) this is a suit brought under a federal statute (45 U.S.C.A. Sec. 184) as set forth in the complaint.

THIRD SECTION

The Federal Law which gives jurisdiction under 28 U.S.C.A. Secs. 1331 and 1337 is Statutory Law and not Federal Common Law.

A large portion of the briefing done by petitioners here is devoted to an argument that it is not necessary to give a United States District Court jurisdiction in a non-diversity action for a federal statute to be directly involved. Petitioners say that all that is necessary is that some portion of the litigation could involve a question on which the federal common law is the binding rule of decision.

This is elaborated on in the Brief for Petitioners beginning on page 10, beginning on page 35, and again beginning on page 53. However, the essence of the argument is contained in the petition for certiorari, pages 3-12, and is stated concisely at the bottom

of page 7 of the petition for certiorari, wherein petitioners say:

> "Thus, federal law—call it federal common law, call it federal substantive law or call it simply law derived from the federal Railway Labor Act—already applies to determining the scope of the enforceability of these airline system board awards, thus the Supreme Court need not call for the fashioning of a new body of federal law. The federal law is there, it need only be applied. And federal courts certainly may enforce federal law, such law being derived from a federal statute."

The whole tenor of the argument is that a case, to give federal jurisdiction, "arises under the Constitution, laws or treaties of the United States" (28 U.S.C.A. Sec. 1331) or is a civil action "arising under any Act of Congress regulating commerce" (28 U.S.C.A. Sec. 1337), if the decisions of the United States Supreme Court are controlling. In short, "federal law" is the equivalent of "federal question," and jurisdiction may be predicated on rules and principles announced by this Court. To put it in blunt language: That an allegation that jurisdiction in the United States District Court was based upon "the decision of the Supreme Court in Roe vs. Doe, the plaintiff contending that the general rule as set out in that case is applicable, and the defendant contending that the exception to the general rule set out in that opinion is controlling, and the decision of the United States District Court as to whether the general rule or the exception is applicable will control the disposition of this case," would be sufficient under either Section 1331 or Section 1337.

To the contrary, we respectfully submit that both statutes refer to "laws," and that means statutes. Always heretofore to raise a "federal question" a United States statute had to be involved as distinct from a rule of law announced by this Court. For example, see:

Luckert vs. Delpark, 270 U.S. 496, 70 L.Ed. 703, 46 S.Ct. 397;
Becher vs. Contoure Laboratories, 279 U.S. 388, 73 L.Ed. 752, 49 S.Ct. 356;
Wells vs. Universal Pictures Co. (2nd Cir.) 166 F. 2d 690;
Eckert vs. Braun (7th Cir.), 155 F. 2d 517.

Certainly *Lincoln Mills*, (353 U.S. 448, 1 L.Ed. 2d 972, 77 S.Ct. 912), in stating that Section 301 gave it a mandate to create a body of substantive law, did not mean that the Supreme Court of the United States could create statutory law so as to come within either of the jurisdictional statutes. It would be stretching *Lincoln Mills* a long way to say that it construed Section 301 as delegating the legislative function to the Supreme Court.

This Court has described federal common law as being "law of independent federal decision" (*U.S. vs. Standard Oil*, 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604, at 332 U.S. 308). For simplicity we treat "federal common law" as being that realm of law in which the decisions of the United States Supreme Court are binding on both state and federal courts. In other words, if this Court has the last say as to what the law is, that is federal common law, There are many,

many instances where the state court has exclusive jurisdiction where a federal statute is involved, and if the state court misapplies that statute this Court would have final jurisdiction.

The one which would appear to be conclusive here relates to suits by railroad and airline employees for wrongful discharge. To make the application clear, Cornstubble, one of the plaintiffs here, was fired by Central Airlines. He then had a choice of filing suit for wrongful discharge based upon the terms of the contract between the union and the airline covering the terms of his employment, or, he could use that same contract, follow the grievance procedure therein set out, and ultimately go to arbitration, as set up in such union contract, which is the provisions for the system board of adjustment. If Cornstubble was successful and obtained an award, he could file suit on that award. If he filed suit for wrongful discharge, his suit is based on the contract between the union and the airline. If he follows the grievance procedure in the contract and then goes through the system board of adjustment and obtains an award, he files suit on the same contract. That is the same contract that the Railway Labor Act told Central Airlines and the union to enter into. That is the same contract provided for by the Railway Labor Act, and the Railway Labor Act regulates one cause of action exactly as much as it regulates the other.

This Court, in *Moore vs. Illinois Central R. Co.*, 312 U.S. 360, 85 L.Ed. 1089, 61 S.Ct. 754, *Slocum vs. Delaware L. & W. R. Co.*, 339 U.S. 239, 90 L.Ed. 795, 70 S.Ct. 577, and *Transcontinental & Western Air, Inc.*

vs. Koppal, 345 U.S. 653, 97 L.Ed. 1325, 73 S.Ct. 906, held that an employee, subject to the terms of the Railway Labor Act (whether railroad or airline worker), who has been discharged by his employer, has the option of following the grievance procedure set up by the employer-union contract and following it through to final arbitration if an airline and the Railway Adjustment Board if a railroad worker, or of treating the termination of his employment as final and filing suit for wrongful discharge. Those cases establish beyond the peradventure of a doubt that when the employee files suit for a wrongful discharge, his cause of action is governed and controlled by state law (see annotation, 61 A.L.R. 2d 911).

In *Moore, Slocum* and *Koppal* this Court has held that an airline employee who is wrongfully discharged can file suit against Central Airlines in the District Court of Tarrant County, Texas, to recover damages for that discharge, and that the law governing such cause of action will be that of the State of Texas. In that suit the cause of action would be based upon a breach of the union-company agreement. A suit for breach of a contract is nothing but a suit to enforce a contract. If the state courts have exclusive jurisdiction (diversity aside) of an action by an employee to recover for wrongful discharge under the contract they would surely have jurisdiction of the same cause of action by the employee to enforce another portion of the same contract between the airline and the union, to-wit, the arbitration provision. To put it another way, *Moore, Slocum* and *Koppal* dealt with contracts between the union and the railroad or airline which

an employee was seeking to enforce. There is no specific grant of jurisdiction to the federal court. Hence, it is a state court action. The union-company contracts in all of those three cases were entered into under the requirements of the Railway Labor Act. Yet, the mere fact that they were so entered into did not create a cause of action based on a federal statute; otherwise, enforcement of those contracts in the state court, under such terms as the state required, would not have been the holding of this Court.

To elaborate a little more on this same point, under 45 U.S.C.A. Sec. 153(p) there is a specific provision that an award of the Railway Adjustment Board, if not voluntarily complied with, can be enforced only by bringing in the United States District Court a suit which "shall proceed in all respects as other civil suits, except that on trial of such suit the findings and order of the Division of the Adjustment Board shall be prima facie evidence of all the facts therein stated." Therefore, there being a specific grant of jurisdiction to the United States District Court of an award from the Railway Adjustment Board, there is federal court jurisdiction. But, there being nothing in the Act to cover the jurisdiction of a suit by an employee to enforce the same contract by recovering damages for wrongful discharge, such action is exclusively in the state court. So here, since Section 153(p) is specifically not applicable to the Airline Adjustment Board, the same reasoning and the same conclusion would force a decision that an action to enforce or prevent the enforcement of an award by an Airline Adjust-

ment Board would likewise be on the same contract and exclusively of state court jurisdiction.

Another section of the Railway Labor Act is the Safety Appliance Act (45 U.S.C.A. Sec. 1 et seq.). Of course, if an employee is injured because of a safety appliance defect, he has the choice of filing suit in the state or federal court because the statute expressly says that such suit may be filed in either the state or federal court. However, if a passenger on a train or a traveler on the highway, or other non-employee to whom the statute specifically giving state and federal concurrent jurisdiction does not apply, files such a suit, the state court has exclusive jurisdiction. That is the direct holding of *Jacobsen vs. N.Y. N. H. & H. R. Co.* (1st Cir.) 206 F. 2d 153, affirmed by this Court 347 U.S. 909, 74 S.Ct. 474, 98 L.Ed. 1067. See also *Anderson vs. Bingham & Garfield R. Co.* (10th Cir.) 169 F. 2d 328, and *Bernstein vs. D. & R. G. Ry. Co.* (10th Cir.) 193 F. 2d 441.

The lower federal courts have many, many times dealt with this problem, involving many many types of actions where various federal statutes were involved. In each of these cases, if a state court had misapplied the federal statute involved, the United States Supreme Court would have had jurisdiction on certiorari. But in each of these cases the holding was that there was exclusive state court jurisdiction. For example, see:

Brouk vs. Managed Funds, Inc. (8th Cir.) 286 F. 2d 901, cert. dism. (Securities Act);

Myer vs. Kansas City Southern Ry. (2nd Cir.)

84 F. 2d 411 (stockholders' derivative action for conspiracy against railroad's and directors' alleged violation of the antitrust laws);

Consolidated Freight Ways vs. United Truck Lines (9th Cir.) 216 F. 2d 543 (violation of the Motor Carrier Act);

Miller vs. Long (4th Cir.) 152 F. 2d 196 (violation of the National Housing Act;

Republic Pictures Corp. vs. Securities First National Bank (9th Cir.) 197 F. 2d 767 (involving the copyright law);

Shelby County vs. Fairway Homes, Inc. (6th Cir.—cert. denied) 285 F. 2d 617 (Defense Housing Act).

Windsor vs. United Airlines, 159 F. Supp. 856 (Warsaw Convention);

Dennis vs. Southeastern Aviation, Inc., 176 F. Supp. 543 (violation of the Civil Aeronautics Act).

Illustrations might be multiplied, but what is important here is to demonstrate that even though the decisions of this Court may be final and binding in the ultimate outcome of litigation predicated upon or involving federal statutes, that is not sufficient to give district court jurisdiction initially.

In each of the above instances, particularly those under the Railway Labor Act, a federal statute was at least as closely involved as it is here. In each of those cases, had a state court wrongly interpreted a federal statute or incorrectly applied it, this Court would have jurisdiction on certiorari. But in each of

those cases the exclusive initial jurisdiction was in the state court and not in the United States District Court. In each of those cases, insofar as the federal statute referred to was concerned, the decisions of the United States Supreme Court would be final and establish the "federal law." In each of those cases the jurisdiction of the United States District Court was denied in the absence of diversity.

This section of the brief, as is obvious from its content, is presented in answer to all of the contentions made by the petitioners in their Brief for Petitioners except those relating to jurisdiction claimed under 45 U.S.C.A. Sec. 184, the airline adjustment board statute.

Also, the authorities above cited are authority for the argument that Section 184 is not the basis for plaintiffs' cause of action, because in each case a federal statute was as much, and in some instances much more, directly involved than Section 184 is involved in this case. In the interest of saving space, we ask the Court to consider the foregoing authorities as supplemental (by way of analogy) to the cases hereafter presented in the Fourth Section of this brief directed to the real question here.

We respectfully submit that the complaint in this case fails to show that the plaintiffs' right to recover will be given or denied depending upon the construction or application of a federal statute; and further, that if "federal law" controls the rights of the parties, it is "federal decisional law" and not federal statutory law.

FOURTH SECTION

A suit by an airline employee to enforce an award in his favor granted by virtue of a contract between a union and the airline does not present a Federal question under either 28 U.S.C.A. Sec. 1331 or 28 U.S.C.A. Sec. 1337.

This was not a diversity case, and the Circuit Court in this case held that this suit did not arise under a federal law or an act regulating commerce, so as to give the District Court jurisdiction under either 28 U.S.C.A. Sec. 1331 or 28 U.S.C.A. Sec. 1337. We have heretofore pointed out that plaintiff relied solely on Section 1331 in the Trial Court, but since the test of what "arises" is the same under Section 1331 and Section 1337, we will brief them both under this section.

In many places, and in innumerable authorities, the various tests for "arises under" have been stated, and in a number of places the authorities have been collected. The shortest statement of all of the principles is contained in the following quotation from 14 *A.L.R.* 2d at page 1003:

> "With respect to basic principles and tests of jurisdiction, it should be kept in mind whether original or removal jurisdiction is sought to be invoked, that (1) Federal courts are courts of limited jurisdiction and examine on their own motion into the question whether they may take, hear, and decide a case; (2) the right claimed must be one which will succeed on one construction of the laws of the United States but will fail on another; (3) there must be a necessity for

> construction of a Federal statute or statutes and a real and genuine dispute or controversy between the parties as to the meaning and effect of a Federal law asserted to be involved; (4) the asserted Federal question must be real, substantial, and meritorious, not frivolous or a well-settled question foreclosed by previous court decisions; (5) the right itself must be Federal in its nature and not merely in its source or origin; (6) presentation of a Federal question must be determined from plaintiff's statement of his own cause of action, of which the claimed Federal right must be an essential element; (7) matters pleaded by plaintiff in anticipation or avoidance of defenses, or matters appearing in such pleadings subsequent to plaintiff's complaint as defendant's answer or petition for removal (or plaintiff's reply, under practice permitting its filing) are entirely immaterial and cannot be considered in determining whether a Federal question is presented."

The cases supporting the seven requirements are collected in that annotation and in an earlier annotation, 12 *A.L.R.* 2d, p. 8 et seq.

The latest statement by this Court which we have found, covering the principles applied by the Circuit Court in this case, is contained in the following quotations from *Pan American Petroleum Corp. vs. Superior Court*, 366 U.S. 656, 6 L.Ed. 584, 81 S.Ct. 1303:

> "It is a settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law. See, e.g., Skelly Oil Co. v. Phillips Petroleum Co.

339 US 667, 672, 94 L ed 1194, 1200 70 S Ct 876, and cases cited. Apart from diversity jurisdiction, 'a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .' Gully v. First Nat. Bank, 299 US 109, 112, 113, 81 L ed 70-72, 57 S Ct 96.

"For this requirement it is no substitute that the defendant is almost certain to raise a federal defense. See Skelly Oil Co. v. Phillips Petroleum Co. and Gully v. First Nat. Bank both (US) supra, and authorities cited in those cases."

* * *

"The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas. What was said in Gully v. First Nat. Bank, 299 US, at 116, is apposite:"

" 'We recur to the test announced in Puerto Rico v. Russell & Co., supra: "The federal nature of the right to be established is decisive—not the source of the authority to establish it." ' "

* * *

"We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive."

* * *

> "Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions."

The rules announced in the *Pan American* case above quoted are not new, and so that we may be, as much as possible, on common ground with the petitioners, we will take the cases they prefer for the announcement of this rule (Brief for Petitioners, pp. 39 and 40), that is, *Gully*, *Shulthis*, and *Russel*, quoting from them. In *Gully vs. First National Bank*, 229 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70, this Court said:

> "Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive. To bring a case within (28 U.S.C. 1331(a)), a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one of the plaintiff's cause of action."

In *Shulthis vs. McDougal*, 225 U.S. 561 (p. 569), 32 S.Ct. 704, 56 L.Ed. 1205, it was said:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily,

> or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

And in *People of Puerto Rico vs. Russell & Co.*, 288 U.S. 476, 77 L.Ed. 903, 53 S.Ct. 447, quoting from 288 U.S. at page 483:

> "For we think that even though petitioner derived its authority to maintain the suit from the Act of Congress, it did not arise under the law of the United States within the meaning of the jurisdictional statutes.
>
> "The suit was brought to recover assessments levied under the Act of the Puerto Rican legislature, but not to enforce a right created by a law of the United States. No question of interpretation or enforcement of the federal statute appears upon the face of the complaint. Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive—not the source of the authority to establish it. Shoshone Min. Co. v. Rutter, 177 U.S. 505, 44 L.ed. 864, 20 S.Ct. 726; Blackburn v. Portland Gold Min. Co., 175 U.S. 571, 44 L.ed. 276, 20 S.Ct. 222, 20 Mor. Min. Rep. 358; Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203, 24 L.ed. 656, 658."

We therefore look to the complaint in this case (R. 1-5) to see what plaintiffs alleged. The first three paragraphs merely give the names of the parties and their residence. Paragraphs 4, 5 and 6 allege that the company and the union entered into a contract "in accordance with statutory requirement (45 U.S. Code § 184), established a board of adjustment of jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment, under the authority of Section 3, Title I of the Railway Labor Act (45 U.S. Code § 153)." Paragraph 8 (there is no Paragraph 7) alleges that such system board handed down awards in favor of Cornstubble, Doud, Broom, Casey, Davis and Fuqua on November 3, 1959 (Paragraph 9), a correct copy of which award was attached as Exhibit B to the complaint. Paragraph 10 says the defendant failed to comply with the award, and plaintiffs then allege:

"11.

"As a result of defendants' failure, each individual plaintiff has suffered and will stand to suffer substantial damages, including loss of wages from the date of their wrongful discharge, all of which is shown in greater detail in the award attached hereto, as Exhibit B.

"12.

"This Honorable Court has jurisdiction of this action under 28 U.S. Code, §1331, this being a matter in controversy exceeding the sum and or value of $10,000, exclusive of interest and costs, and arises under the laws of the United States, specifically under the Railway Labor Act as set out more particularly hereinabove."

The award itself does not apply the Railway Labor Act, it does not construe the Railway Labor Act; as a matter of fact, it does not even mention the Railway Labor Act by name or by citation, nor is the Railway Labor Act involved even by inference in the award.

Now, applying the first principle recognized by the courts as necessary to determine federal district court jurisdiction, what kind of lawsuit is this?

It is, of course, an action on a contract. There was a contract between the union and the company, of which the union members were either parties or beneficiaries, and the suit is one to enforce that contract. We do not think the petitioners will deny this, but to be orthodox we quote 3 *Am. Jur.* "Arbitration and Award" Sec. 154, p. 972:

> "§ 154. Generally.—It has been authoritatively stated that the entire proceedings of arbitration and award merely constitute a contract between the parties. At the time of the submission they agree to do what shall be awarded; and when the award is made, it is read into the original agreement. In accordance with this view, at common law the successful party can enforce the award only in the same manner as he can enforce an ordinary contract, with the added advantage that the award may be introduced in evidence and is conclusive as to the matters therein decided in so far as they are within the terms of the submission."

See also *Kentucky River Mills vs. Jackson* (6th Cir. cert. denied) 206 F. 2d 111, and *In Re Southern Pac. Co.* (D.C.) 155 F. 1001.

What we want to argue is that this was an action for breach of contract as set forth in the complaint, not an action to enforce a federal statute nor one, as far as the complaint shows, which will turn upon the construction or application of a federal statute. To use the language we have already quoted above from *Pan American:*

> "The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive."

In addition to the decision by the Fifth Circuit in this case and in *National Airlines vs. Metcalf*, 271 F. 2d 817, this same question has been decided by the Circuit Court of Appeals and by the District Court a large number of times. The first case we want to call the Court's attention to is *Duplisea vs. Main Central Ry.* (1st Cir.-cert. denied) 260 F. 2d 495, where in disposing of this identical question the Circuit Court said:

> "The complaint is conveniently vague as to the basis of federal jurisdiction . . . Nor is there any allegation of a breach of a duty imposed or the violation of a right given by the Constitution, the Railway Labor Act, or any other federal statute . . . . Nor does the complaint raise any question as to the validity, construction, or effect of the Constitution or of any law of the United States. On the contrary under the terms of the complaint, plaintiff seeks damages for an alleged wrongful discharge in violation of the terms of a collective bargaining agreement negotiated by the Railroad and the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act."

Certainly every word said there is applicable to the complaint in this lawsuit.

The second case is *Amalgamated Ass'n of Street, etc., Employees vs. Southern Bus Lines* (5th Cir.-cert. denied), 189 F. 2d 619, where in disposing of the same jurisdictional question but under a different statute the Circuit Court said:

> "Upon the allegations of the complaint, we think it clear that the court below did not have jurisdiction over this controversy. No facts are alleged upon which the conclusion can legitimately be based that the District Court independently of the arbitration agreement would have jurisdiction of the 'subject matter of a suit arising out of the controversy between the parties' as required by Section 4 of the Federal Arbitration Act, 9 U.S.C.A., Par. 4 . . . .Viewing the base at bar against this background of established principle, we do not find in it the elements of federal jurisdiction. *What is here involved in merely a controversy between the parties as to the construction of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but only arises from the subsequent contractual relations of the parties.* The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship." (Italics ours.)

Again we say, not only is the holding of the Court in the case above quoted from directly in point, but the language is just as applicable to the complaint in

this case as it was to the complaint presented in that case.

Plaintiffs claim no statutory right to reinstatement. Plaintiffs claim no statutory right to damages for the difference between the wages they would have earned and what they actually earned in other employment. What we are trying to say has been better said by the courts. For example, we quote from *Starke vs. N.Y., C. & St. L. R. Co.* (7th Cir.) 180 F. 2d 569:

> "Any plausibility in plaintiff's contention arising from a literal reading of the section relied upon has been, in our judgment, entirely dissipated by a long line of court decisions construing the history, the purpose and the rights created by the Railway Labor Act. It is plain that the wrong of which plaintiff complains, that is, the impairment of his seniority rights, stems entirely from an agreement entered into in conformity with the requirements of the Act between plaintiff's bargaining agent and the defendant. Plaintiff has no statutory or constitutional right to seniority. Such right exists solely by reason of the contract. Hence his right is not one which 'involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.' Shulthis v. McDougal, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.Ed. 1205. See also Gully v. First National Bank, 299 U.S. 109, 112, 57 S.Ct. 96, 81 L.Ed. 70."

Or, as was said in *Hettenbaugh vs. Airline Pilots Ass'n International* (5th Cir.), 189 F. 2d 319, quoting from page 321:

> "There is no allegation here that the bargaining agreement between the parties discriminated against the appellants. At most, there is an allegation of a breach of the bargaining agreement. Any right of action, if one exists, is based on the alleged breach of the bargaining agreement, and does not arise under the Railway Labor Act, but only from the consequent contractual relations of the parties. The federal courts are not charged by federal law with the duty of policing parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. See Hayes v. Union Pac. R. Co., 9 Cir., 184 F. 2d 337."

Or, as was said in *Barnhart vs. Western Maryland Ry. Co.* (4th Cir.-cert. denied), 128 F. 2d 709, at page 713:

> "What is here involved is merely a controversy between the parties over an alleged wrongful discharge of the plaintiffs from employment existing after the passage of an Act of Congress, and possibly affected as to some of its working conditions by the published decisions of the Labor Board; but the right of action asserted does not arise from any provision of the statute, and the determination of the controversy does not depend upon any disputed validity, construction or effect of the statute. In other words, the employment may have been inspired by the Act, but a right of action for the defendant's alleged breach of the contract does not arise from the Act; but only from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship."

A district judge, in *Air Line Dispatchers Ass'n vs. California Eastern Airways, Inc.*, 127 F. Supp. 521, p. 524, said:

> "Portions of the Railway Labor Act, 45 U.S.C.A. §§ 151, 152, 154, 163, enjoin upon the owners and their employees the duty to *make* and *maintain* agreements covering rates of pay, rules and working conditions. But a suit to enforce a right which has its origin in the laws of the United States is not for that reason alone within the federal jurisdiction. For suit to 'arise under Act of Congress' it must involve a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. Shulthis v. McDougal, 1912, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205; Gully v. First National Bank, 1936, 229 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70; Marshall v. Desert Properties, 9 Cir., 1939, 103 F. 2d 551.
>
> "The complaint here alleges a breach of the agreement. The employment and the agreement may have been inspired by the Act but the right of action does not arise from the Act but only from the consequent contractual relations of the parties. Such a breach does not confer jurisdiction upon the Federal Court. Barnhart v. Western Maryland Ry. Co., 4 Cir., 1942, 128 F. 2d 709; Strawser v. Reading Co., D.C.E.D. Pa. 1948, 80 F. Supp. 455; Hayes v. Union Pac. R. Co., 9 Cir., 1950, 184 F. 2d 337, affirming D.C.N.D.Cal. 1950, 88 F. Supp. 108; Starke v. New York, Chicago & St. Louis R. Co., 7 Cir., 1950, 180 F. 2d 569; Burke v. Union Pac. R. Co., 10 Cir., 1942, 129 F. 2d 844."

We can add to the citations of authorities, but pri-

marily we want them to say in the court's language what we are trying to say. Plaintiffs here sued to get reinstatement and for damages. There is nowhere in the complaint or in any brief filed a statement that there is any statute that entitles the plaintiffs to reinstatement or to damages. There is no such statement because there is no such statute. The plaintiffs have a lawsuit, if they have any, because of a contract, and this is nothing but a suit to enforce a contract.

As we have heretofore pointed out, the award on which suit is brought does not quote the Railway Labor Act, does not cite the Railway Labor Act, and as a matter of fact does not mention it. The award is based solely on the contract. The contract, which was attached to the petition (R. 6), recites (Par. 3(b)):

> "In compliance with Section 204, Title II of the Railway Labor Act, as amended, there is hereby established a system board of adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the Mechanics' Agreement and any amendments or additions thereto" etc.

Section 204, referred to, is 45 U.S.C.A., Sec. 184, and it provides the only language in the entire Railway Labor Act that is applicable to the matter now before this Court. That language is:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the

jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title."

There is nothing in the above language (and nothing anywhere else in the Act) that describes or provides for what such contract for arbitration or adjustment shall contain. It has a maximum, in that such board of adjustment cannot exceed in jurisdiction or authority the boards provided for under Section 153, but what else such agreement may contain is left entirely to the contract between the parties. We take it that the agreement of the parties could not make the award of such an adjustment board more final than one by the Railway Adjustment Board, but they could make it less final; they could not give it more jurisdiction than the boards for railroads, but they could give it less jurisdiction: they could provide for almost any type of adjustment or arbitration, could set up any form of procedure, could provide for submission solely on the record, or could provide for hearing additional evidence; they could provide for a permanent neutral, or they could provide for the selection of a neutral from a source other than the mediation board: they could, in short, put anything in it that they chose to after negotiations.

This Court, with reference to the railway section of the Railway Labor Act, stated in *Terminal Ry. Ass'n vs. Brotherhood of Ry. Trainmen*, 318 U.S. 1, 87 L.Ed. 571, 63 S.Ct. 420, quoting from 318 U.S. at page 6:

"The Railway Labor Act, like the National Labor

> Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers. Cf. Pennsylvania R. Co. v. United States R. Labor Bd. 261 US 72, 67 L ed 536, 542, 43 S.Ct. 278."

The above language is certainly equally applicable to Section 184, above quoted. Paraphrasing, it can aptly be said here:

> "So far as the Act itself is concerned, these adjustment agreements may be as bad as the parties will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for such adjustment agreements."

Let us point out a misstatement repeated throughout petitioners' brief. Petitioners insist that it was the intent of Congress that the system board of adjustment for airlines should be exactly like that of

the National Railway Adjustment Board (Brief for Petitioners, pp. 11, 44 and 47, for example). To the contrary, Section 184 provides that the parties shall "establish a board of adjustment of jurisdiction *not exceeding* the jurisdiction which may be lawfully exercised by system, group" etc. How petitioners can get "not exceeding" to be synonymous with "exactly like" we do not know. Nor do they suggest any reason.

The real issue in this case, of course, is whether Cornstubble has a cause of action by reason of a federal statute. To put it in question form, "What part of what federal statute gives Cornstubble a cause of action for reinstatement or for damages?" This is the essence of the issue before this Court. This is the "crucial issue" (Brief for Petitioners, p. 13). Does Cornstubble's cause of action arise from the contract or does it arise from the statute? If the contract gives him a cause of action, does the statute take it away? If the contract denies him a cause of action, does the statute give it to him? In short, is his cause of action contractual or statutory?

We can approach this from a slightly different angle to illustrate the fact that there is no federal statute involved. This is a lawsuit, as we have said, by Cornstubble to recover a judgment ordering his reinstatement and for money damages. The defendant has the right to tender him employment and have tried only the issue of damages under the contract and under the award. In that case then, the only thing that would be involved would be how much Cornstubble would

have earned had he not been fired and how much he has earned in other employment. The Trial Court determines those two facts and renders judgment. What federal statute is involved? What federal question is involved? Where is your federal jurisdiction?

The case is tried on the question of whether or not the arbitrator had been bribed, and the Court submits to the jury the question and the jury finds on sufficient evidence that the arbitrator had been bribed, and therefore holds the award void. Where is the statute which determines whether the plaintiff or the defendant recovers? Where is the federal question?

Suppose the Trial Court holds that under the contract between the union and the company the arbitrator had to pass on the right of the airline to fire Cornstubble for refusal to work overtime. As we have heretofore pointed out, Cornstubble was fired both because he refused to work overtime and because he refused to give a reason for his refusal to work overtime. As we have heretofore pointed out, the arbitrator specifically (R. 33) refused to pass on the right of the defendant to discharge Cornstubble for failure to work overtime. If the Court holds that under the contract the arbitrator had to pass on both reasons for discharge, which statute passed by Congress is involved?

Each one of these questions we are asking could be raised only by the defensive pleading, and not even those questions are presented by the complaint in this case.

Perhaps we can wind up this section of the brief

with a paraphrase of this Court's opinion in *Pan American Petroleum Corp. vs. Superior Court*, quoted heretofore, wherein the Court said:

> "The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.
>
> * * *
>
> "We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive."

We paraphrase that to say:

> "The rights as asserted by Cornstubble are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of employer-employee relationships.
>
> * * *
>
> "We are not called upon to decide the extent to which the Railway Labor Act reinforces or abrogates the private contract rights here in controversy. The fact that Cornstubble sues in contract or quasi-contract, not the ultimate validity of his arguments, is decisive."

We respectfully submit that the judgment of the Trial Court and the Circuit Court is correct and that in this particular case the United States District Court did not have jurisdiction.

Before concluding this brief, we want to apologize because we have not been able to better collate this brief to the "Brief for Petitioners." We would like to blame this on petitioners' brief and not on our own lack of ability, because it seems to us that petitioners have said the same thing in so many different ways that they have not made a series of contentions in logical order but the same two contentions repeated over and over again. Having that view, the divisions of this brief are, we think, an answer to every contention made.

Petitioners and amicus curiae have referred to the Congressional Record and have made one or two quotations from the Record. Nothing quoted or cited deals with the question presented by the complaint in this case. Nothing quoted or referred to deals with jurisdiction of the United States District Court. We have not read the Congressional Record. The statute is too plain to justify an excursion into the Congressional Record. We have the very strong feeling that the Congressional Record should be resorted to only in a case of dire necessity, and assume that petitioners were in dire necessity or they would not have used such inapposite quotations and references. Anyway, what was said in the *Sinclair* case, which we have heretofore quoted, and what was said in *Caminetti vs. United States*, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192, takes care of the situation. Quoting from *Caminetti:*

> "In other words, the language being plain, and not leading to absurd or wholly impracticable con-

sequences, it is the sole evidence of the ultimate legislative intent."

We respectfully submit that the judgment of the Trial Court and the Circuit Court should be affirmed.

SUMMARY OF ARGUMENT

FIRST SECTION

It is here argued that the judgment of the Trial Court is correct, irrespective of the point actually decided by the Circuit Court, because plaintiffs' complaint was in effect a separate lawsuit by six people, and there was no allegation that as to each more than $10,000 was involved.

SECOND SECTION

Congress has explicitly excluded suits by airline employees from the terms and provisions of Section 301 of the National Labor Relations Act, and jurisdiction based on Section 301 cannot be the basis for jurisdiction here. Similarly, an award in favor of an airline employee is expressly not within the terms of the railroad portion of the Railway Labor Act (45 U.S.C.A. Sec. 153(p)) and thereby Congress likewise evidences its intent that no federal court jurisdiction was intended. Respondent argues that the exclusion of airline employee awards from Sections 301 and 153(p) evidences a congressional intent that awards by airline employees should be handled differently and enforced differently, thereby supporting the judgment of the lower court that, unlike awards in favor of railroad employees where there is specific grant of

federal court jurisdiction, and unlike awards to which Section 301 of the National Labor Relations Act is applicable where there is a specific grant of federal court jurisdiction, there is no grant of federal court jurisdiction applicable to the award in this case.

THIRD SECTION

This section is respondent's answer to petitioners' contention that if federal law (federal common law) is applicable to the cause of action asserted, then a federal question is presented. Respondent contends that federal law, to give a district court jurisdiction, means federal statutory law, and that even if the federal rule of decision could control questions which might be raised in the trial of the case, there is no district court jurisdiction unless the plaintiffs' complaint shows that their cause of action is based upon a federal statute. Respondent in this section also cites and discusses numerous instances where, under the Railway Labor Act and other federal statutes, the "federal rule of decision" can control the final disposition but in which there is no federal primary jurisdiction in the district court because the suit is not brought to enforce a federal statute nor does the construction or interpretation of a federal statute necessarily determine the outcome of the case.

FOURTH SECTION

This is the section where the respondent briefs and argues the primary issue before the Court, which is whether or not this suit is one which "arises" under 45 U.S.C.A. Sec. 184, the Railway Labor Statute,

which requires that airlines and the union representing their employees must enter into contracts including one for a system board of adjustment. Respondent contends that such statute merely requires such a contract and does not specify what it shall contain or what it shall not contain, and that the result is that when an airline employee brings suit upon an award rendered in his favor by an adjustment board established by such a contract, he is bringing a suit on a contract and not on a statute. The suit is a common-law suit for enforcement of a contract, and the fact that such contract is one required by federal statute does not change the action from one for recovery on a contract to one for the enforcement of a right given by a federal statute.

CONCLUSION AND PRAYER

Respondent believes that the Trial Court and the Circuit Court judgment was correct, both for the reasons contained in such opinions and for the reasons herein expressed, and therefore respondent prays that on hearing either the petition for certiorari be dismissed or judgment be entered affirming the judgment of the Circuit Court and the Trial Court.

Respectfully submitted,

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Copies of this brief have been mailed to the attorneys for the petitioners, on the same date that same were mailed to the Clerk of this Court, by mailing one copy of the brief to each of the petitioners' attorneys, addressed as follows: Plato E. Papps, 1300 Connecticut Avenue, N.W., Washington 6, D.C.; Charles J. Morris, 1601 National Bankers Life Building, Dallas 1, Texas; Bernard Dunau, 912 Dupont Circle Building, Washington 6, D.C. Also, two copies have been mailed to the attorneys for amicus curiae, addressed to Samuel J. Cohen, 50 East 42nd Street, New York 17, New York.